No. 89-284

IN THE

Supreme Court of the United States

October Term, 1989

DENNIS LOFTUS, *Et. Al.*,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Et Al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS REPLY BRIEF

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REPLY TO FEDERAL RESPONDENT'S STATEMENT OF THE CASE

Despite the federal respondent's attempt to inaccurately portray the factual history of this case, and to shift the focus of events, the real issue here does not remain submerged. That issue is that these petitioners, plan participants, were unlawfully denied a hearing on the merits of their case. From the outset, the federal respondent improperly frames the issue in this case, miscalculates the severity of the injury and refuses to confront the nature of the harm.

The federal respondent misleadingly states what is at issue here. The federal respondent states, "Each petition sought a declaratory judgment that the Brewery Workers Pension Fund had been partially terminated . . . ." (Br. 2). But the Internal Revenue Service (IRS) definitively ruled prior to the time the petitions were brought that the Brewery Workers Pension Fund had been partially ter-

minated. (Pet. App. 71a) It is precisely because of that IRS ruling that petitioners sought declaratory judgment review regarding the tax-qualified status of the Brewery Workers Pension Plan. The real question concerns whether the United States Tax Court can lawfully deprive this entire class of plan participants of its statutory right to judicial review of the IRS Commissioner's determination concerning its pension plan. Petitioners seek one objective only — to obtain a hearing by the Tax Court on the merits of their case. Petitioners are not seeking the ratification or dismantling of a particular result. This case is about Tax Court jurisdiction; the right of petitioners to present the merits of their case, as guaranteed by Section 7476. This case is not about a factual dispute or merger.

The federal respondent inartfully tries to insinuate, (Br. p. 3 note) that the NYS Fund is not in compliance with NYS court orders declaring the funds integrated. This is totally misleading. In accordance with the order of the NYS Supreme Court, the NYS Fund trustees have continuously provided pension benefits to all participants of the integrated pension plan, including specifically those individuals who had been participants in the Brewery Fund prior to the integration. As the record demonstrates, the participants have so far been damaged in the amount of more than seven million dollars in irrevocable payments from their retirement plan and each year the total increases by more than $700,000.00.

The federal respondent misleadingly states that the NYS Fund Trustees "did not fully cooperate with the Brewery Workers Fund representatives." (Br. 4). This postulate is totally fallacious. It has no basis in fact or in the record and should be stricken. In fact, it was the Brewery Workers who, with arrogance and disdain for the boundaries of the ERISA rules, filed an unauthorized application with the Internal Revenue Service. They sought to have it appear that the application came from the NYS Fund. The Brewery Fund application, which identified the NYS Fund as the applicant when it was not, was submitted to the IRS without the knowledge, consent or authorization of the NYS Fund. Furthermore, the application was not filed in accordance with ERISA, which mandates that all "interested parties" be notified. In a technical advice memoran-

dum, issued by the National Office, the Internal Revenue Service pointed to the seriousness of the Brewery Fund's lack of notification. (Br. 5)

The NYS Fund representatives, openly seeking the guidance of the IRS, had met in April 1976 with IRS officials. At that time, the NYS Fund was told by the IRS to refrain from taking further steps to obtain IRS determinations concerning the integration agreement.

The federal respondent fixates on the notion of "merger" and consistently tries to build the perception that somehow the merger is at issue. The merger is not at issue here. The issue, as recognized by the IRS Commissioner himself, is judicial review of the 1985 IRS determination. To confuse this issue is to defeat justice. All participants are seeking is not to be denied their statutory right to review of the IRS determination. The IRS Commissioner, the chief of the administrative agency charged with enforcement of the tax laws, has expressed himself unequivocally that the Tax Court has declaratory judgment jurisdiction in this case and that the 1985 ruling by the Commissioner is entitled by statute to judicial review. (Pet. App. 50a et seq.)

The federal respondent carelessly embraces the Tax Court's incorrect finding that the 1983 request for a determination was in reality a challenge to the 1976 determination. (Br. 8). Such a finding was neither fair nor reasonable. Speculation as to the motivation of the petitioners and as to a remote link to an earlier ruling is pure conjecture and is not relevant to the issue. Moreover, such conjecture itself is a "backdoor" attempt to weave fallacious fact finding into an opinion, which purportedly is to assume in response to a motion to dismiss the facts as set forth by petitioners. Tax Court authority does not extend to speculation and characterizing the motivation of petitioners' request for declaratory judgment review without a full and fair hearing on all the facts and circumstances of the case is inappropriate.[1] The scope of the Tax Court's authority

[1]Even The IRS Commissioner, declaring that there is a case or controversy present, warned the Tax Court that there was "no cause to delve, or advantage in delving, into subtle motives." (Pet. App. 65a)

provides for an analysis of whether the Commissioner's determination, in view of *all* of the facts and circumstances of the case , was made in accordance with the law. ***Frank Bruce Stevens v. Commissioner,*** 49 TCM 1261 (1985)

REPLY TO FEDERAL RESPONDENT'S ARGUMENTS FOR DENYING THE WRIT

The federal respondent, in echoing petitioners' description of this case as a "unique set of circumstances", suggests that there exists no reason for review by this Court. However, this case's singular exception to the established rule of law — that an entire class of interested parties is ordinarily entitled to its day in court to challenge an erroneous legal determination by the Commissioner that adversely affects its pension plan — is indeed the very reason why this Court should act to rectify the Tax Court's error. The federal respondent's attempt to suggest that petitioners have not been denied their day in court on the merits of their claim (Br. 13) signals its desperateness to keep the Tax Court's disgraceful denial of judicial review from the light of dispassionate inquiry.

1. The federal respondent summarily suggests that petitioners, plan participants and employees, are not "interested parties" within the meaning of Internal Revenue Code Section 7476. However, it conspicuously fails to articulate what principles of statutory construction explain how these same employees were indisputably "interested parties" for purposes of their applications for determination.[2] The Commissioner acted upon their applications, determined that they were interested parties, and issued one of the requested determinations — albeit not the answer they were seeking. There is no basis for concluding that these same parties are not now entitled to judicial review of the determination they received. Such an assertion flies in the face of the statute as well as all of the previous rulings made by the Internal Revenue Service (IRS) in this case.

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[2]The federal respondent concedes in its statement (Br. 4) that the Teamsters Fund and its participants were interested parties for purposes of obtaining a determination.

The record amply demonstrates that in response to petitioners' suggestion that the original 1976 determination letter should be revoked, the IRS National Office issued a General Counsel's Memorandum (GCM 37682) on September 19, 1978, which addressed whether participants in the NYS Fund were "interested parties" pursuant to I.R.C. Section 7476 (b)(2) with respect to the 1976 determination letter. That memorandum concluded that the NYS Fund participants were "interested parties" pursuant to Section 7476 who were required to have been given notice of the 1976 determination letter application. The memorandum also found that NYS Fund Participants *"were effectively deprived of their opportunity to participate in the Service's consideration of the application."* (emphasis added). Thus, the Commissioner has already concluded that NYS Fund participants, petitioners herein, are "interested parties" within the meaning of Section 7476(b)(2). No sound reason exists, nor have any reasons been advanced, why the statutory term "interested parties" in Section 7476(b)(1), has any different meaning from that same term in Section 7476(b)(1), particularly where it was implemented for the same purpose.

We note also that the Congressional purpose in enacting Section 7476 was that, ". . . the committee has decided that interested employees should be allowed to participate in the consideration by the Service of a [plan sponsor's] request for a determination *and any controversy connected with it.*" S.Rep. No. 93-383, 93d Cong., 2d Sess. 112, reprinted in 1974 *U.S. Code Cong. & Admin. News* 4996 (emphasis added). The legislative history also states that the need for judicial review provided by Section 7476(b)(1) to an "interested party" arose because, "[a]s a practical matter there is no effective appeal from a Service determination (or refusal to make a determination . . ." *Id.* Taken in conjunction, these statements demonstrate that the "interested party" provisions of Section 7476 are intended to encompass the same group of persons. Accordingly, the legislative history soundly supports petitioners' arguments.

2. Contrary to the federal respondent, petitioners' contention in this case is that the Commissioner should not have determined that the new pension plan had tax qualified status when it was to

be the product of a merger of the NYS Fund and the Brewery Workers Fund, where prior to that merger the Brewery Workers Fund had been partially terminated. Petitioners argued that the tax consequences of that undisputed partial termination rendered any resulting plan unqualified, in part because of the obvious inability to meet IRS minimum funding standards. Thus, despite the federal respondent's attempt to portray petitioners' actions as a naked attempt to prevent the merger, the inescapable fact is that the Internal Revenue Code provides a legal forum for the very challenge mounted here, which is well-grounded in tax law.

3. The federal respondent asserts that no actual controversy is present. Yet the record plainly demonstrates an actual controversy. That controversy concerns whether the partial termination of the Brewery Fund had the effect of disqualifying the Brewery Fund, thereby rendering the plan amendment of the NYS Fund invalid, and consequently, not eligible for qualified status because it was premised upon integration with an unqualified plan. The IRS determination letter holds that the partial termination of the Brewery Fund, which it found to have occurred prior to the integration, had no effect on the Brewery Fund's qualified status (Pet. App. 71a).

Ordinarily, a plan sponsor or participant brings an action under Section 7476 for a declaratory judgment that its employee plan is qualified after the Commissioner had determined that it is not, or was not, qualified under Section 401(a). Sometimes the sponsor will bring an action concerning a favorable letter that is conditioned on certain subsequent action that the sponsor does not believe is necessary for the plan to be qualified. *See, Celanese Corporation of America v. Commissioner*, Docket No. 10867-84"R" (1985) (conditioned on obtaining approval of change in funding method; dismissed after condition met). Also, participants who believe that they are wronged by the plan's terms or operation, sometimes may sue the Commissioner concerning an unconditional favorable letter issued to the plan sponsor. *Thompson v. Commissioner*, 71 T.C. 32 (1978). While on the surface it might appear to be in the best interests of a participant that the plan be qualified, in a number of situations the participant's interests may be quite adverse to having the plan be

approved as submitted. A participant might receive more or better benefits if the plan sponsor was forced to amend the plan or administer it differently. *See, e.g. Thompson, supra.*

Thus, while a determination letter may be labeled favorable, both petitioners *and the IRS Commissioner before the Tax Court* took the position that actual controversies could arise between the Commissioner and a particular participant for whom the Commissioner's so-called "favorable" determination had adverse consequences. (Pet. App. 63a) Indeed, even the Rules of the Tax Court make clear that a notice of determination may be challenged whether or not it was favorable or adverse to the plan. Rule 211, Commencement of Action for Declaratory Judgment, provides that separate procedures, be followed depending on whether the Notice of Determination declares the retirement plan to be qualified or unqualified.[3] In addition. Rule 210(c)(1), states that the Tax Court will have jurisdiction where, "the Commissioner has issued a notice of determination. . .". The terminology applied is intentionally general and intended to refer to any "determination" and thus encompass favorable or unfavorable rulings which determine either that a plan does or does not qualify. Consequently, a determination by the Commissioner approving the qualified status of a plan may not be favorable but adverse to an interested party, thereby creating an actual controversy. (Pet. App. 65a)

It is also true that the nub of the actual controversy requirement in Tax Court declaratory judgment actions is the presence of a "live dispute between the parties." *Powell v. McCormack*, 395 U.S. 486, 517-18 (1969). The Tax Court's own rules define the nature of this "live dispute"' under Rule 210 (C)(2), requirements for jurisdiction, as follows:

There is an actual controversy. In that connection — (i) in the

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[3]Rule 211(C)(4)(iv) provides for procedures, "Where the Commissioner has issued a notice of determination that a retirement plan does qualify . . . ." Rule 211(C)(4)(iii) provides for procedures, "Where the Commissioner has issued a notice of determination that a plan does not qualify. . . ."

> case of a retirement plan action, the retirement plan or amendment thereto in issue has been put into effect before the commencement of the action.

Congress sought to ensure that the plan, or amendment thereto, was in effect prior to Tax Court review in order to preserve the integrity of the prohibition against a court's issuance of advisory opinions. The Tax Court's rules implement the sense of Congress which is revealed in the legislative history. H.R. Rep. No. 93-807, 93 Cong. 2d Sess. 107 (1974), on Tax Court Procedure, provides:

> In order to satisfy the Tax Court that an actual controversy exists, [a plan sponsor] will have to place the plan into effect prior to the time he petitions the Tax Court for a declaratory judgment.

Here, the plan amendment had already been determined to have been qualified by the Commissioner and the amendment had been put into effect before petitioners commenced their action in Tax Court. Hence, an actual controversy exists which requires the Tax Court to exercise jurisdiction. Finally, it must be noted that the record demonstrates that participants have so far been damaged in the amount of more than seven million dollars ($7,000,000.00) in irrecoverable payments from their retirement plan and that each year the total increases by more than seven hundred thousand dollars ($700,000.00) — an amount sufficient to indicate the adverse nature of petitioners' interest about this very live dispute.

4. The federal respondent relegates to a footnote (Br. 13, n. 6) the significant fact that his legal position with respect to jurisdiction and standing has flip-flopped. The Commissioner has not explained this dramatic reversal of position. We note a few examples of what he urged in the Tax Court opposing dismissal based on lack of jurisdiction:

> This Court has jurisdiction, pursuant to Section 7476, over only those issues that bear on the qualification of those retirement plans. . . . In general, each of the cases before this Court concerns the qualification under Section 401(a) of the Brewery

Fund or the Teamsters Fund. . .

(Pet. App. 55a)

In docket nos. 12440-85 "R" through 12444-85 "R", the petitioners request the Court to make a declaration concerning whether the partial termination of the Brewery Fund resulted in its disqualification, whether a disqualified Brewery Fund could merge with the Teamsters Fund and have the merged funds be qualified, and whether the merger resulted in the termination and disqualification of the Brewery Fund and, by implication, the Teamsters Fund. They are qualification issues raised in the application and answered in the technical advice memorandum and thus are properly subject to the jurisdiction of this Court under Section 7476.

(Pet. App. 57a)

The petitioners in consolidated docket nos. 12445-85 "R" through 12449-85 "R" make a number of requests for relief, including the same claims for relief as those described above, to which the same jurisdictional analysis applies.

(Pet. App. 58a)

[T]hese cases are based at least in part on a determination within the meaning of Section 7476(a)(1) . . . Whether the Commissioner made a determination, within the meaning of Section 7476(a)(1), or failed to make a determination, within the meaning of Section 7476(a)(2) respondent believes that any alleged failure to rule on a particular issue does not by itself deprive this Court of jurisdiction. Thus, to the extent that the issue is a "qualification issue" and there exists a case or controversy, this Court has jurisdiction. . .

(Pet. App. 61a)

The individuals, as participants in the merged Funds of the Teamsters Fund and the Brewery Fund, have an interest in the issue of the Brewery Fund's qualification and the effect that that determination may have upon their benefits. Clearly, the successor plan administrator of the Brewery Fund is an eligible petitioner under Section 7476(b)(1).

(Pet. App. 66a)

> For the reasons stated herein, respondent asserts that this Court has jurisdiction over each of the 10 petitions. . . . WHEREFORE, respondent requests the Court to . . . rule that it does have jurisdiction over the petitions filed in those cases.
>
> (Pet. App. 68a)

It is difficult to take the federal respondent's position in this Court with any degree of respect when it originally was exactly the opposite and changed only for litigation purposes.

CONCLUSION

For the reasons stated herein and in the petition for the writ, it is respectfully requested that the petition be granted.

Respectfully submitted,

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